In The

Supreme Court of the United States

October Term, 1990

Dr. Irving Rust, *et al.*,
Petitioners,
v.
Dr. Louis W. Sullivan,
Secretary of Health and Human Services,
Respondent.

The State of New York, *et al.*,
Petitioners,
v.
Dr. Louis W. Sullivan,
Secretary of Health and Human Services,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF OF THE AMERICAN ACADEMY OF MEDICAL ETHICS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN ACADEMY OF MEDICAL ETHICS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

The American Academy of Medical Ethics is an educational and lobbying organization with approximately 20,000 physician members, incorporated to respond to the challenges to established medical ethics emerging in recent decades. The Academy adheres to the Hippocratic Oath in opposing abortion except to save the life of the mother. The Academy has previously pursued its interests before this Court through participation as *amicus curiae* in cases including *Webster v. Reproductive Health Services* (No. 88-605), *Turnock v. Ragsdale* (Nos. 88-790, 88-1309), and *Cruzan v. Director, Mo. Dept. of Health* (No. 88-1503).

The Academy addresses this Brief to the First Amendment claims made by Petitioners. The Academy submits this Brief in support of Respondent and asks the Court to affirm the decision of the United States Court of Appeals for the Second Circuit.

INTRODUCTION AND SUMMARY OF ARGUMENT

> "This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. . . . [N]o legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving . . . abortion." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting).

In this case, Petitioners seek to distort this Court's First Amendment jurisprudence in furtherance of a policy favoring abortion. In concocting a First Amend-

[1] This Brief *Amicus Curiae* is filed with the consent of all parties to this proceeding. A letter from each attorney stating this consent has been filed with the Clerk of this Court.

ment challenge to regulations (under Title X of the Public Health Services Act, 42 U.S.C. § 300 *et seq.*) that implement Congress' decision to subsidize preventive family planning but not abortion, Petitioners adopt a twofold stratagem. First, they obscure and mischaracterize the Title X program and the regulations at issue. Second, they selectively cite and quote cases from various First Amendment contexts that are inapposite—*e.g.*, outright prohibitions or penalties on speech, taxation of the press, regulation of public forums. At the same time, they ignore controlling precedent that acknowledges the government's ability to choose when and how it will subsidize citizens' exercise of their constitutional rights. Petitioners' tactics should not be allowed to distort either the nature of the Title X regulations or settled First Amendment jurisprudence.

The Title X regulations challenged by Petitioners do not infringe their First Amendment rights. The regulations apply only to the Title X program and are designed to ensure that recipient organizations do not thwart the purposes of Title X by using Title X funds to *subsidize* their non-Title X abortion services. With respect to recipient organizations' activities outside the Title X program, the Title X regulations place no restrictions on abortion counseling, referral, advocacy or activities of any nature whatsoever, including performance of abortions. In short, the Title X regulations do not bar pro-abortion speech by Petitioners; rather, they merely refuse to *subsidize* it.

Petitioners' distortions of First Amendment jurisprudence are an effort to establish that Title X must be "viewpoint neutral". Petitioners therefore ignore the holdings of *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), and misconstrue *Regan v. Taxation Without Representation*, 461 U.S. 540 (1983). These cases establish that government may encourage citizens to exercise their constitutional rights, including their First Amendment rights, in a particular

way so long as it does not directly interfere with those rights. *Maher* and *Harris* establish specifically that government may validly promote childbirth over abortion. Instead of addressing these cases, Petitioners rely heavily on cases that involve outright bans on speech. Petitioners also rely heavily on cases applying a public forum analysis, but they do not even attempt to defend their assumption that the Title X program is in any sense a "forum" for speech. Title X plainly was not designed to provide an opportunity for citizens to debate the issue of abortion; it is a vehicle for the government to provide what it deems to be appropriate family planning services.

Most importantly, Petitioners' proposed regime of "viewpoint neutrality" would transform government as we know it and could be used to subvert the policy goals of nearly any government program. When the government subsidizes an anti-smoking campaign, must it also subsidize a pro-smoking campaign by cigarette manufacturers? When government funds programs designed to discourage drug use, must it also fund groups that advocate legalization of drugs? May it not, for example, limit drug treatment referrals to programs that do not use methadone? When Congress establishes a National Endowment for Democracy, 22 U.S.C. § 4411 *et seq.*, need it also establish a National Endowment for Communism or a National Endowment for Fascism?

Petitioners' revolutionary theory of viewpoint neutrality in government-funded programs would transform Title X into a reproductive Tower of Babel. If subsidization of "pro-choice" advocacy is constitutionally required, then certainly "pro-life" advocacy cannot be precluded from the program (as it now is). The regulations could not require that each project provide a broad range of family planning methods, 42 C.F.R. § 59.5(a)(1), because that would discriminate against the viewpoint of those who oppose artificial methods of birth control.[2]

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[2] The government noted in its brief below a United States Catholic Conference comment on the proposed rules stating that Cath-

Those who oppose *any* form of birth control could demand subsidy for a program that discourages contraceptive use. If subsidization of abortion counseling is constitutionally required, a grant applicant could argue that a full range of prenatal counseling and adoption counseling (perhaps extending until delivery) must be funded as part of the program. Under Petitioners' theories each of these situations would require a constitutional analysis under the First Amendment. Whether *any* government-funded family planning program could survive such regulatory restructuring and litigative machinations is questionable.

Nor do Title X regulations unconstitutionally restrict or penalize use of private funds for speech. The Title X regulations apply only to the Title X program, not to all the activities of the recipient organization: the organization remains free to use private funds to counsel or advocate respecting abortion outside the Title X program. Within the Title X program, the up-to-10% matching funds and grant-generated income that the recipient organization agrees to dedicate to the Title X program are effectively "public moneys" under *Regan*. Outside the Title X program, Petitioners' real complaint is that the Title X regulations properly prevent them from using Title X funds to cross-subsidize their non-Title X abortion activities and to solicit clients for their non-Title X abortion services.

COUNTERSTATEMENT OF THE CASE

Petitioners sow confusion about Title X and then attempt to exploit this confusion. In particular, four major distortions about Title X programs afflict their briefs. First and most generally, Petitioners blur the clear distinction between a Title X program and a recipient organization's other programs and activities. Second, in arguing that Title X impermissibly subsidizes childbirth over abortion, Petitioners mischaracterize the regulations' requirements. Third, Petitioners wrongly invoke the doctrine of informed consent by assuming that Title X counseling employees, rather than the non-Title X physician treating the woman's pregnancy, are responsible for ensuring informed consent for pregnancy treatment. Fourth, they garble the components of Title X funding in order to deny its essentially public nature.

olic organizations cannot become grantees "because of the statutory requirement that all grantees must provide a full range of contraceptive family planning." Brief for the Appellee at 54 n.41, *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989) (Nos. 88-6204 and 88-6206).

A. The Title X Regulations Apply Only To The Title X-Funded Program, Not To A Recipient Organization's Other Programs And Activities.

Title X is a spending program under which the federal government exercises its constitutional power to provide services related to preventive family planning and *not* services related to abortion. In enacting Title X, Congress specifically provided that "[n]one of the funds appropriated under [Title X] shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. This statutory exclusion means that "abortion is not to be encouraged or promoted in any way" by Title X. 116 Cong. Rec. 37375 (Nov. 16, 1970).

The Title X regulations draw a clear line between the funded Title X program and a recipient organization's other programs and activities. The Title X regulations apply only to the Title X program. 42 C.F.R. §§ 59.1, 59.2. They

> do not restrict the use of funds outside the Title X program or impose restrictions on funds provided under other federal programs. Nor do they prevent a woman from seeking and obtaining an abortion outside the Title X program. They thus make no attempt to establish abortion restrictions beyond the parameters of a Title X project.

53 Fed. Reg. at 2925. Thus, outside the funded Title X program, the Title X regulations place no restrictions on the rights of recipient organizations, to engage in pro-

abortion counseling, referral, advocacy, or activities of any nature, including performance of abortions.

Petitioners [3]—especially the *Rust* Petitioners—attempt to blur this clear line between a recipient organization's Title X program and its other programs and activities in an apparent attempt to exaggerate the impact of the Title X regulations. For example, they confusingly employ such terms as "Title X clinics," "Title X agencies" and "clinics"—sometimes apparently referring to the Title X program and sometimes to the recipient organization as a whole, depending on which suits their purposes.[4] Likewise, they sometimes use the term "non-Title X sources" to refer to the matching funds and grant-related income that are part of Title X, and other times use the same term to refer to funds outside the scope of Title X.[5] Nowhere do they clearly acknowledge that the Title X regulations impose no restrictions on recipient organizations' non-Title X programs and activities.

B. Petitioners Distort The Regulations' Requirements.

In attempting to support their contention that the Title X regulations impermissibly subsidize speech about childbirth over speech about abortion, Petitioners mis-

[3] The Brief for Petitioners in *Rust v. Sullivan* (No. 89-1391) is cited herein as "Rust Brief at ——." The Brief for Petitioners in *New York v. Sullivan* (No. 89-1392) is cited herein as "State Brief at ——."

[4] *See, e.g.*, Rust Brief at 3 n. 5 ("only 33% of Title X agencies reported that Title X grants were their mean largest single source of support"); *id.* at 4 (listing medical services, including "abortion services," provided by "Title X clinics"); *id.* at 23 (alleging that Title X regulations set "trap" for patients at a "Title X clinic"); *id.* at 28-29 (discussing facilities and resources of "Title X clinics"); *id.* at 30 (regulations do not permit "staff at the Title X clinic" to advise of abortion services).

[5] *Compare, e.g.*, Rust Brief at 12 (referring to "such non-Title X sources [*sic*] as matching funds, patient fees, and other reimbursements or monies"), *with id.* at 27 n. 27 (referring to funding of abortion counseling by "non-Title X sources" such as Title V of the Social Security Act).

characterize the specific regulations that they challenge in a variety of ways.

Petitioners contend that Section 59.8 "suppress[es] speech about abortion and compel[s] speech about childbirth." State Brief at 32. This extravagant rhetoric is off the mark. In the first place, the Title X regulations govern merely what Title X *subsidizes*; they do not suppress any speech about abortion. Nor do they require that Title X programs express any "anti-abortion ideology." State Brief at 32. Petitioners seize on and distort an *example* in the Title X regulations that provides that a project counselor *permissibly* responds to a request for an abortion referral by stating that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." 42 C.F.R. § 59.8(b)(5). Contrary to Petitioners' contention (Rust Brief at 7; State Brief at 5-6, 33), this response is not mandatory but is rather merely an illustration of a permissible response. Moreover, the statement that abortion is "not . . . appropriate" simply delineates the scope of the Title X program. As is clear from the regulations, the counselor need only refrain from counseling about or referring for abortion, and need not express any anti-abortion ideology.

Likewise, Petitioners' claim that Section 59.8 compels speech about "childbirth" (State Brief at 32) and "compel[s] the clinic or counselor to provide information that promotes continuing a pregnancy to term" (Rust Brief at 11) is grossly overstated. Section 59.8(a)(2) provides merely for transitional counseling and referral for clients diagnosed as pregnant, just as Title X regulations provide for appropriate referrals for other medical conditions. 42 C.F.R. § 59.5(b)(1); 53 Fed. Reg. at 2937. The referral list of appropriate prenatal care providers may include providers who also perform abortions. 42 C.F.R. § 59.8(a)(3).[6] Provision of basic health informa-

[6] Petitioners contend that the referral list "must include providers who do not perform abortions—regardless of their medical

tion (for example, that alcohol consumption poses risks to the fetus) as part of the referral operates to *preserve a pregnant woman's options* until such time as she consults with a *treating* physician concerning her pregnancy. Absent this transitional counseling and referral, a pregnant woman might discover at the time of such consultation that she had unknowingly taken actions that risked the health of her unborn child, and might feel compelled to abort a child that she would otherwise have welcomed. With the benefit of this transitional counseling and referral, the woman retains the option, after consulting with a treating physician, to choose between carrying and aborting her child.

Petitioners also mischaracterize Section 59.9. Section 59.9 requires that a Title X program "have an objective integrity and independence from" a recipient organization's pro-abortion activities. 42 C.F.R. § 59.9. As discussed below (*infra* at 29), this regulation is properly designed to ensure that Title X funds are not used to subsidize abortion services. Section 59.9 does not require "complete," "wholesale" physical and financial separation. State Brief at 6; Rust Brief at 5. Rather, Section 59.9 contemplates a comprehensive multi-factored analysis of *degrees* of separateness in order to determine whether the Title X program has objective integrity and independence.

Finally, Section 59.10 prohibits use of Title X funds for pro-abortion advocacy, litigation and lobbying. This prohibition reflects the fact that Title X is a government program that provides services, not a forum for speakers.

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qualifications." State Brief at 5. This contention has no basis in the regulations and is rebutted by the very authority cited in purported support: if a provider is not medically qualified, it is not an "available provider" of "appropriate" services. 42 C.F.R. § 59.8(a)(3). Nor is referral of a woman for prenatal care done "regardless of her medical circumstances," as Petitioners also allege. State Brief at 33. Section 59.8 provides for emergency referrals for abortion in the case of an ectopic pregnancy or other life-threatening condition.

As the Secretary has made clear, Title X funds also may not be used for anti-abortion advocacy, litigation and lobbying. *E.g.*, Brief for the Appellee at 57 n.43, *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989) (Nos. 88-6204 and 88-6206). Section 59.10 expressly addresses pro-abortion activities in order to confront the abuses that actually have been encountered. *See* 53 Fed. Reg. at 2923-25.

C. The Title X Regulations Do Not Affect The "Informed Consent Dialogue" About Treatment Of Pregnancy.

Petitioners complain that the Title X regulations disrupt a supposed "informed consent dialogue" between a Title X employee and a pregnant client by excluding discussion of abortion. State Brief at 37, 39. Petitioners' complaint is illusory. As Title X does not provide *medical treatment* for pregnancy, the responsibility for ensuring informed consent for any subsequent treatment lies not with Title X employees, but with the non-Title X physician who treats the woman's pregnancy.[7] Title X employees neither can nor should obtain a pregnant client's consent to non-Title X medical treatment. In short, the informed consent dialogue about medical treatment of pregnancy takes place outside the Title X program, and the Title X regulations do not affect or restrict it in any way. (For further discussion of this point, see Brief Of The Association Of American Physicians And Surgeons As *Amicus Curiae* In Support Of Respondent, Section IV (hereinafter cited as AAPS *Amicus Brief*)).

D. Petitioners Misrepresent The Nature Of Funding Of Title X Programs.

As discussed below (*infra* at 26-28), Title X funding is essentially public in nature. As part of their effort to obscure this fact, Petitioners' briefs create confusion

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[7] Conversely, in connection with the provision of contraceptive services, the Title X regulations do permit factual information about abortion that enables the client to assess the relative risks and benefits of various contraceptive methods. 42 U.S.C. § 59.8(b)(6); 53 Fed. Reg. at 2932.

about the funding of Title X programs—a confusion that is also reflected in the First Circuit majority's opinion in *Massachusetts v. HHS*, 899 F.2d 53 (1st Cir. 1990) (*en banc*). For example, Petitioners use the phrase "non-Title X funds" to refer to the matching funds and grant-related income dedicated to the Title X program. *E.g.*, Rust Brief at 25. Likewise, by comparing the amount of Title X grant funds to the *overall* operating budget of recipient organizations (including their non-Title X programs and activities), Petitioners leave the false impression that Title X grant funds account for far less than 10% of the costs of the Title X programs. *See, e.g.*, Rust Brief at 3 n.5; State Brief at 42 & n.44. Accordingly, it is necessary to review precisely what Title X and its regulations provide regarding funding.

Section 59.2 of the Title X regulations defines Title X project funds to "include all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds." 42 C.F.R. § 59.2. This definition is designed to ensure that no funds allocated to a Title X program are used to promote abortion, because provision of Title X grant funds to such a program would violate 42 U.S.C. § 300a-6. *See* 53 Fed. Reg. at 2927.

"Grant funds" are funds appropriated by the federal government under Title X. Under 42 U.S.C. § 300a-4(a), grants generally must be for *at least* 90% of a program's estimated costs.[8] *See* 42 C.F.R. § 59.11(b) (grant generally must "be made for not less than 90 percent of the

[8] The State Petitioners somehow read this same Section 300a-4(a) as providing a 90% ceiling on the federal grant fund share of the Title X program costs, when it in fact provides a floor. *See* State Brief at 42. Likewise, the First Circuit majority misread this same statutory section in support of its mistaken assertion that Title X projects "are required to provide nonfederal 'matching funds' of *at least* 10%" of the costs. *Massachusetts v. HHS*, 899 F.2d at 55 (emphasis added).

Title X project's costs," as estimated by the Secretary). Thus, other sources of Title X program funds will account for *no more than* 10% of the program costs.

"Matching funds" are funds that the grantee agrees to dedicate to the Title X program. General HHS regulations, 45 C.F.R. § 74.50 *et seq.*, govern these matching funds. *See* 42 C.F.R. § 59.215. When the terms of the grant permit, the matching fund share can be satisfied by grant-related income generated by the Title X project. 45 C.F.R. § 74.53(c).

"Grant-related income," as defined by general HHS regulations, includes income received from activities "part or all of the cost of which" is funded by a federal grant, including "income in the form of fees for services performed" during the grant period. 45 C.F.R. § 74.41(a); *see* 42 C.F.R. § 59.215. Thus, income generated by the Title X project, including fees paid by Title X clients, constitutes grant-related income. Unless the terms of the grant otherwise provide, grant-related income must be used to offset the allowable costs of the program (just as gross income normally offsets gross costs). 45 C.F.R. § 74.42(c)(1).[9] Alternatively, if the terms of the grant permit, grant-related income can count towards a matching requirement, 45 C.F.R. § 74.42(d), or can be used to expand the program beyond allowable costs, *id.* § 74.42(e).

[9] Thus, if a program incurs $100,000 of gross allowable costs, generates $10,000 in grant-related income, and has a 90% federal funding share and a 10% matching requirement, the $10,000 in income is deducted from the $100,000 of costs to determine net costs of $90,000. The 90% federal funding share applies to this $90,000 net figure (not the $100,000 gross figure), so that the federal funding share is $81,000 (not $90,000). 45 C.F.R. § 74.42(c)(2).

ARGUMENT

I. THE TITLE X PROGRAM DOES NOT VIOLATE THE FIRST AMENDMENT RIGHTS OF THOSE WHO CHOOSE TO PARTICIPATE IN THE PROGRAM.

A. The Government's Title X Funding Decision Is Subject To Rational Basis Scrutiny And Meets This Standard.

Petitioners' briefs ignore the holdings of *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980).[10] But those precedents are central to the proper analysis of the First Amendment issues in this case. Petitioners have taken arguments made under the Fourteenth Amendment in *Maher* and *Harris* (arguments that did not succeed in those cases) and have restated them as First Amendment arguments. Petitioners fail to recognize, however, that the principle of *Maher* and *Harris*—that government may encourage citizens to exercise their rights and freedoms in a particular way so long as it does not directly interfere with protected activity—applies with equal force to First Amendment activity. *Maher*'s rationale in fact is based on earlier authority implicating free speech rights, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and subsequent Supreme Court authority adopts *Maher*'s analysis in upholding a government decision not to subsidize certain speech, *Regan v. Taxation Without Representation*, 461 U.S. 540 (1983).

In *Maher*, the Court addressed a challenge to a Connecticut regulation limiting Medicaid benefits for first trimester abortions to those that are medically necessary, even though the program subsidized medical expenses incident to pregnancy and childbirth. The regulation was challenged under the Equal Protection Clause of the Fourteenth Amendment on the ground that it allegedly

[10] Indeed, the Rust Brief cites *Maher* and *Harris* only once in passing. Rust Brief at 35.

impinged upon a fundamental right—the right to abortion—protected by the Constitution. In rejecting the challenge, this Court emphasized "a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." 432 U.S. at 475.

The *Maher* Court derived this principle in part from *Meyer v. Nebraska*, 262 U.S. 390 (1923). Although *Meyer* struck down a state law making it a criminal offense to teach foreign languages to young children, the Court in *Maher* recognized that *Meyer* did not "den[y] to a State the policy choice of *encouraging* the [State's] preferred course of action." *Maher*, 432 U.S. at 476-477.

> Indeed, in *Meyer* the Court was careful to state that the power of the State "to prescribe a curriculum" that included English and excluded German in its free public schools "is not questioned." 262 U.S. at 402.

Maher, 432 U.S. at 477. The teaching of foreign languages penalized by state law in *Meyer* is speech protected by the First Amendment.[11] Yet in *Maher* this Court did not hesitate to draw from *Meyer* the principle that government encouragement of one course of action over another, constitutionally protected course of action is permissible. *Harris v. McRae* confirms this principle. "Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement." *Harris*, 448 U.S. at 318. Whether the protected activity is speech about abortion or a woman's right to obtain an abortion, the constitutional analysis is the same: The government's decision to *encourage* one course of action over another constitutionally protected course of action need only have a rational basis. *Maher*, 432 U.S. at 478.

[11] *See* L. Tribe, *American Constitutional Law* 789 (2d ed. 1988) (citing *Meyer* as a case of government abridgment of speech).

Regan v. Taxation Without Representation, 461 U.S. 540 (1983), confirms the applicability of the *Maher* analysis to government decisions not to subsidize some forms of speech. *Regan* rejected a First Amendment challenge to Internal Revenue Code provisions which disqualify an organization from receiving tax-deductible contributions if the organization engages in substantial lobbying. *Regan* expressly drew upon the principles of *Maher* and *Harris* in rejecting the argument that strict scrutiny should be applied to these tax provisions:

> We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny . . . . *Harris v. McRae*, *supra*, and *Maher v. Roe*, 432 U.S. 464 (1977), considered legislative decisions not to subsidize abortions, even though other medical procedures were subsidized. We declined to apply strict scrutiny and rejected equal protection challenges to the statutes.
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> The reasoning of these decisions is simple: "although government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation." *Harris*, 448 U.S. at 316.

Regan, 461 U.S. at 549-550 (bracketed phrases in original). *Regan* therefore applied a rational basis test to the government's decision to subsidize some speech but not other speech. *Id.*

Under the analysis settled by *Meyer*, *Maher*, *Harris* and *Regan*, the regulations at issue here permissibly encourage by subsidy some forms of speech over others but do not prohibit or interfere with speech. Petitioners object to provisions of the regulations prohibiting Title X programs from "counseling concerning the use of abortion," 42 C.F.R. § 59.8(a)(1); encouraging, promoting, or advocating abortion, *id.* § 59.10(a); and "assist[ing] women to obtain abortions or increas[ing] the availability or accessibility of abortion," *id.* Rust Brief at 15. But all of these are restrictions on *subsidized* counseling and advocacy in a federal program, not general restrictions on speech. Just as the government may fix the curriculum in publicly funded schools so long as it does not prohibit subjects from being taught outside those schools, *Maher*, 432 U.S. 476-477 (discussing *Meyer*), the government may specify the scope of counseling services in the Title X program. Similarly, "Congress could, for example, grant funds to an organization dedicated to combating teenage drug abuse, but condition the grant by providing that none of the money received from Congress should be used to lobby state legislatures." *Regan*, 461 U.S. at 548. There is no constitutional distinction between imposing a condition that funds not be used to lobby and imposing a condition that funds not be used to counsel concerning abortion or to advocate abortion.[12]

Although the *Maher* Court recognized that the government's refusal to fund abortions "may [make] childbirth a more attractive alternative, thereby influencing the woman's decision," it nonetheless subjected the funding program only to rational basis scrutiny because the government imposed "no restriction on access to abortions that was not already there." 432 U.S. at 474. It follows that even if the government's refusal to fund abortion counseling means that information concerning childbirth is more readily available than information concerning abortion,[13] the government's funding decision also is sub-

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[12] Indeed, lobbying is a form of political speech and as such is entitled to the highest degree of First Amendment protection. "The First Amendment affords the broadest protection to political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (citation omitted).

[13] Because Title X is limited to pre-conceptional services, 42 C.F.R. § 59.2 (definition of "family planning"), the program does not furnish services related to childbirth. Only in the context of a referral out of the Title X program is a pregnant woman given transitional information designed to preserve her options until she seeks further medical help. *Id.* § 59.8(a)(2). *See supra* at 7-8. Thus, the Title X program furnishes information concerning childbirth only in a very indirect and limited way.

ject only to rational basis scrutiny because it places no restriction on access to abortion information outside the Title X program.

Maher and *Harris* further establish that a government decision to encourage childbirth over abortion is rationally related to a constitutionally permissible purpose. *Maher* held that the "State unquestionably has a 'strong and legitimate interest in encouraging normal childbirth,' . . . an interest honored over the centuries." 432 U.S. at 478 (citation omitted). *Harris*, following *Maher*, made it unmistakably clear that government may single out abortion as a medical procedure it will not encourage: "Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." 448 U.S. at 325. The federal government's decision not to fund abortion information services (as well as abortions themselves) rationally promotes the government's interest in encouraging childbirth over abortion.

B. Title X Does Not "Discriminate Invidiously" In A Way That "Aims At The Suppression Of Dangerous Ideas".

While pointedly ignoring the principles articulated in *Meyer*, *Maher*, *Harris* and *Regan*, Petitioners quote out of context, and make the centerpiece of their argument, language from *Regan* that actually is directed toward the very different situation where government seeks to suppress certain ideas by, for example, denying a citizen a generally available independent benefit because of his speech.

In concluding that "Congress has not violated TWR's First Amendment rights by declining to subsidize its First Amendment [lobbying] activities," *Regan* notes that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to ' "ai[m] at the suppression of dangerous ideas." ' " *Regan*, 461 U.S. at 548 (quoting *Cammarano v. United States*, 358 U.S. at 498, 513 (1959), in turn quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958)). This

"invidious discrimination" language from *Regan* does not bar mere decisions to subsidize one viewpoint and not another. If it did, *Maher* and *Harris* would have to be overruled because they permit government to support one constitutionally protected choice and not another. Far from overruling *Maher* and *Harris*, *Regan* draws its rationale from them. *See* 461 U.S. at 549-50.

The "invidious discrimination" language on which Petitioners rely is aimed at a much more aggressive government action, as the very words "suppression" and "dangerous ideas" themselves suggest.[14] *Regan* draws the "suppression of dangerous ideas" phrase from *Speiser v. Randall*, 357 U.S. 513 (1958), which struck down a California law that *generally* denied all tax exemptions to persons who refused to provide an oath of loyalty. *Regan* explains that the rule of *Speiser* is limited to situations where government seeks to deny a citizen an "independent benefit" because of the citizen's exercise of a constitutionally protected right, but does not apply where "Congress has merely refused to pay" for the constitutionally protected activity "out of public moneys." 461 U.S. at 545. Here, as in *Regan*, Congress merely has refused to pay for abortion counseling out of public monies.

Title X has no coercive effect on private speech, as defined in *Speiser* and *Regan*. The law at issue in

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[14] The Rust Brief cites *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987), as support for Petitioners' assertion that viewpoint neutrality is required in government-funded programs. But *Arkansas Writers' Project* was decided on the basis of principles concerning taxation of the press—principles that are simply inapplicable to government-funded programs. *Arkansas Writers' Project* struck down on First Amendment grounds a state sales tax that applied to all magazines except religious, professional, trade and sports journals. 481 U.S. at 224. The principle governing the decision is that "selective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State." *Id.* at 228. Thus the rationale of the case is explicitly limited to situations involving taxation of the press.

Speiser, which denied tax exemptions generally, "necessarily [had] the effect of coercing the claimants to refrain from the proscribed speech." 357 U.S. at 519. The Title X program, by contrast, leaves agencies that seek to counsel concerning abortion or to promote abortion free to do so outside of Title X. Such agencies also do not lose the opportunity to participate in the Title X program by virtue of any pro-abortion activities they engage in outside the program.

Moreover, *Regan*'s caveat is directed at "invidious" discrimination in subsidies. A government preference for childbirth over abortion is in no sense invidious discrimination. *Maher* validated government's right to "make a value judgment favoring childbirth over abortion," 432 U.S. at 474 (citation omitted), and *Harris* recognized that abortion is a unique medical procedure because of its "purposeful termination of a potential life." 448 U.S. at 325. In light of these precedents, a subsidy that favors childbirth over abortion cannot be said to create a "suspect" or "invidious" classification.

Finally, Title X does not implement the government's preference for childbirth in a way that threatens to suppress discussion of abortion. Both anti-abortion and pro-abortion advocacy, litigation and lobbying with Title X funds is forbidden. See *supra* at 8-9. It is only in the requirements for transitional referrals out of the Title X program after a woman becomes pregnant that the regulations even arguably can be said to favor childbirth over abortion. The very limited amount of information that is furnished about prenatal care in the context of that referral hardly can be said to tip the scales so far in favor of childbirth as to constitute "suppression" of the idea of abortion. Similarly, the fact that the government refrains from providing referrals for the sole purpose of abortion[15] does not suppress information

[15] The regulations allow referrals to health care providers that provide prenatal care and also provide abortions. 42 C.F.R. § 59.8(b)(4).

about abortion. The private sector functions vigorously in furnishing abortion information and services, as a glance at almost any yellow pages will reveal.[16]

C. Petitioners' Arguments That A "Viewpoint Neutrality" Test Should Be Applied to Government Funding Decisions Are Fundamentally Unsound.

As discussed above, *Regan* in no way requires that government funding decisions be neutral as between competing policy viewpoints. Petitioners, however, seek support for a proposed regime of viewpoint neutrality by selective quotation and citation of cases dealing with public forum doctrine, often without identifying them as public forum cases.[17] But Petitioners do not even attempt to address the fundamental issue of whether a Title X program is in any sense a "forum" for speech.

[16] The *Rust* Brief refers to the views of commentators that express concern over government expression that "approaches monopolization of the marketplace of ideas." Rust Brief at 24 n.39. The only support cited from the cases of this Court is footnote 8 in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3052 (1989), where the Court notes that a ban on use of state facilities to perform abortions might call for a "different analysis" if a particular State had socialized medicine and all of its hospitals and physicians were publicly funded." It is ludicrous to suggest that the Title X program creates a monopoly on information about abortion when the program is designed precisely to have nothing to do with abortion. There is no contention that abortions are not available in the private sector. Abortion providers also make abortion information readily available.

[17] Petitioners likewise improperly rely on cases involving outright bans or penalties on speech. For example, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (cited in Rust Brief at 9 n.29), involved a ban on drug advertising. *Schacht v. United States*, 398 U.S. 58 (1970) (cited in Rust Brief at 18 n.28), overturned a law making it a crime for an actor to wear a military uniform in a play if the role was critical of the military. *Boos v. Barry*, 485 U.S. 312 (1988) (cited in Rust Brief at 18), involved criminal sanctions for picketing outside an embassy. *Wooley v. Maynard*, 430 U.S. 705 (1977) (cited in Rust Brief at 14 and State Brief at 34), overturned a criminal conviction of a person who expressed himself by covering the New Hampshire state motto on his license plate.

The Title X program is not a "forum" for speech, public, nonpublic or otherwise. First, public forum analysis applies only where a speaker seeks access to government's real or physical property.[18] "[A] speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns" in the context of public forum analysis. *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 801 (1985) (charitable solicitation in federal workplace). Thus, public forum analysis deals with the allocation of situses under government control. Petitioners here do not seek access to physical property belonging to or used by the government. Rather, they seek a monetary grant or subsidy. The public forum cases do not purport to address issues of access to government subsidies or programs; those issues are addressed by *Maher*, *Harris* and *Regan*, as discussed above.

Second, public forum analysis applies only in those situations where the government has tolerated or created a channel for expressive activity to function separate from, and without the imprimatur of, the voice of the government itself. Each type of forum recognized by the Court is characterized by debate and communication of ideas that are the speakers' own, by voices that are not identified with the government.[19]

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[18] *See, e.g., Boos v. Barry*, 485 U.S. 312 (1988) (streets or sidewalks); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (state fair); *Widmar v. Vincent*, 454 U.S. 263 (1981) (state university meeting facilities); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (internal mail system within a public school); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (advertising spaces on city-owned buses).

[19] A "quintessential public forum" is one that has "by long tradition or by government fiat . . . been devoted to assembly and debate." *Perry Education Ass'n*, 460 U.S. at 45. A limited public forum is created "by government designation of a place or channel of communication . . . for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802. In those cases where this Court has recognized a nonpublic forum, the government had created a system of communication for persons who were not speaking on behalf of the government. *See, e.g., Cornelius, supra* (system of charitable solicitation of federal employees by organizations outside government); *Perry Education Ass'n, supra* (school mail system used by teachers to send personal messages and by outside groups with permission); *Lehman, supra* (advertising space on public buses); *Greer v. Spock*, 424 U.S. 828 (1976) (outside speakers invited to military base).

By contrast, the Title X program was not designed to facilitate communication of the ideas of persons who do not speak for the government. It is not designed as a channel for expressive activity, but rather as a program to provide "family planning methods and services." 42 U.S.C. § 300(a). And it is not designed to accommodate expression of a non-government persons' views on family planning generally (*e.g.*, whether artificial contraceptives are or are not appropriate or whether abortion is or is not an appropriate method of family planning). Rather, it is a government program for delivery of services that the government has decided are appropriate. The "forum" for debate of the government's policy choices was the Congress. "Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer . . . ." *Harris*, 448 U.S. at 318.

Petitioners' proposal that federal programs be viewpoint neutral is so extreme that even they cannot apply it consistently. Petitioners themselves concede that some viewpoints can be removed from the Title X program without constitutional difficulty. Petitioners appear to accept the notion that abortion counseling can be confined to "nondirective counseling." *E.g.*, Rust Brief at 2. But "nondirective counseling" (if it means anything) must mean that patients are neither told that abortion is never appropriate nor are advised that abortion is the best option in their circumstance. Thus, "nondirective counseling," a limitation which Petitioners do not challenge, itself involves the elimination of some viewpoints.[20]

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[20] Petitioners likewise concede that the regulations requiring "nondirective counseling" did not permit pro-life counseling centers to participate in the Title X program. Rust Brief at 16 n. 27.

Petitioners' lapses of logic derive from the more basic problem that application of their proposed doctrine of viewpoint neutrality would transform government as we know it. It has never been suggested that the federal government must allow any view to be expressed as part of a government program or that it can only fund programs expressing every possible viewpoint. When Congress establishes a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. § 4411(b), it does not also have to fund a National Endowment for Communism or a National Endowment for Fascism. If government funds programs to discourage cigarette smoking, it does not also have to fund programs to promote smoking. So long as citizens are free to express their disagreement with government policy, government is free to adopt and implement constitutionally permissible policies even though that means subsidizing one viewpoint and not another.[21]

D. This Court Has Never Held That Expression Of Viewpoints Within The Doctor-Patient Relationship Is Entitled To Special Protection.

Although they cite no authority (except Plato) in support of the notion, Petitioners seem to argue that "the speech of a doctor or counselor with her patient" is entitled to special First Amendment protection. Rust Brief at 20-24. But the Constitution creates no recognition of one profession, or of the professions generally, as entitled to greater First Amendment rights.

It has never been thought that doctors' speech to patients may not be regulated. Such a notion surely would eliminate a whole area of tort law. Doctors in fact are

[21] *See* L. Tribe, *American Constitutional Law* 807 (2d ed. 1988) ("The first amendment does not, for example, prevent government from promoting respect for the flag by proclaiming Flag Day or by using public property to display the flag. Those who disdain the national symbol may express that view but may not silence government's affirmation of national values, nor may they insist that government give equal circulation to their viewpoint . . . .")

tightly constrained in what they may or may not say to a patient. A doctor may truly believe that giving a particular warning about a prescribed medicine or procedure is not in the patient's best interest, but if he neglects to give the warning he may be subject to liability. This Court has recognized that the government has a strong interest in preserving the health of its citizens, *see, e.g., Cruzan v. Director, Mo. Dept of Health*, 58 U.S.L.W. 4916, 4920-4921 (U.S. June 26, 1990), and few states have hesitated to exercise those interests by regulating the conduct of the medical profession, including its communications with patients.[22]

This case is not one where "the State requires [the physician] to communicate its ideology." *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 472 n.16 (1983) (O'Connor, J., dissenting). As noted by Justice O'Connor's dissenting opinion in *Akron*, such concerns are raised by cases such as *Wooley v. Maynard*, 430 U.S. 705 (1977), where a statute "in effect require[d] that [a person] use [his] private property as a 'mobile billboard' for the State's ideological message." 430 U.S. at 715. The Title X regulations impose no such general requirement on physicians. Rather, the regulations apply only to those physicians who choose to participate in the Title X family planning program. There simply is no compelled speech.

Even for physicians who choose to participate in the government program, the regulations do not require any communication of a government "ideology." The only required communication of which Petitioners complain

[22] For example, California requires a "standardized written summary" to be given a patient being treated for breast cancer covering "the advantages, disadvantages, risks and description of the procedures with regard to medically viable and efficacious alternative methods of treatment." Failure to provide the summary constitutes "unprofessional conduct." Cal. Health & Safety Code § 1704.5 (West 1990). New York has a similar requirement. N.Y. Pub. Health Law § 2404 (McKinney Supp. 1990). *See generally* authorities cited in AAPS *Amicus* Brief, Section IV.

comes in the context of the post-conception transitional referral. The provision of a "list of available providers that promote the welfare of mother and unborn child," 42 C.F.R. § 59.8(a)(2), does not involve communication of medical advice at all, nor does it involve the Title X clinician in communicating any government "ideology" on abortion. Telling a patient that the Title X program does not give referrals to clinics that only provide abortion services is no different from telling a patient that the Medicaid program does not pay for abortions. *See Harris, supra.* The requirement that a physician provide prenatal health information in the context of the referral merely preserves the patient's options until she decides where to seek further medical care. It does not involve communication of an "ideology" for a physician to tell a woman that smoking, drinking, drugs, or exposure to rubella may injure the fetus.

Finally, "the constitutional entitlement of a physician who administers medical care to an indigent woman is no broader than that of his patient." *Harris*, 448 U.S. at 318 n.21. While Petitioners complain that an indigent woman might not receive information concerning abortion if that information is not provided in the Title X program, they ignore the fact that *Maher* and *Harris* explicitly recognized that refusal to fund abortions might leave an indigent woman no alternative but to carry her child to term. *Maher*, 432 U.S. at 474 ("indigency . . . may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions"); *Harris*, 448 U.S. at 316-17. As in *Maher* and *Harris*, the regulation "has imposed no restriction on access to abortions that was not already there," 432 U.S. at 474, and is constitutionally permissible.[23]

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[23] Petitioners attempt to argue that the regulations mislead the Title X client into believing that she is receiving full information about options for abortion. In fact, the regulations do precisely the opposite. A woman who asks for abortion information is to be told that the Title X program "does not counsel or refer for abortion." If at any other point during counseling the Title X clinician believes that a woman should be told that she is not being given information about abortion, nothing in the regulations prevents the clinician from saying so. Indeed, the Title X regulations operate to make clear from the outset that the scope of Title X does not extend to abortion counseling or referral.

As described above, n.7 *supra*, information concerning abortion may be provided in the context of a discussion of the relative safety of various contraceptive methods.

II. THE TITLE X REGULATIONS DO NOT UNCONSTITUTIONALLY RESTRICT OR PENALIZE USE OF PRIVATE FUNDS.

A. The Title X Regulations Permissibly Restrict Use Of The Matching Funds And Grant-Related Income That Supplement The Direct Federal Funding Of 90% Of The Costs Of Title X Programs.

Purporting to rely on *FCC v. League of Women Voters*, Petitioners contend that the Title X regulations violate the First Amendment by restricting pro-abortion speech funded by the recipient's "own private funds"—by which Petitioners mean the matching funds and grant-related income that offset no more than 10% of the estimated net costs of each Title X program. Rust Brief at 12; *see id.* at 25-27; State Brief at 46 n.50. The First Circuit majority in *Massachusetts v. HHS*, 899 F.2d 53 (1st Cir. 1990) (en banc), identified this argument as the fundamental ground on which it disagreed with the Second Circuit ruling now before the Court. *Id.* at 71. Petitioners, and the First Circuit, incorrectly apply *League of Women Voters* and *Regan*.

In *League of Women Voters*, the Court held that Section 399 of the Public Broadcasting Act of 1967 violated the First Amendment by forbidding any noncommercial educational bradcasting station that received a grant from the Corporation for Public Broadcasting ("CPB") from engaging in editorializing. In determining that Congress had not merely exercised its spending power to refrain from subsidizing public broadcasting editorials, the Court emphasized that under Section 399, "a non-

commercial educational station that receives *only 1%* of its overall income from CPB grants is barred absolutely from all editorializing." 468 U.S. at 399-400 (emphasis added). Because the ban on editorializing applied to *all* of the station's activities, "[t]he station has no way of limiting the use of its federal funds to all noneditorializing activities, and, more importantly, it is barred from using even wholly private funds to finance its editorial activity." *Id.* at 400.

The Title X regulations are fundamentally distinguishable in two separate and sufficient respects from the statute at issue in *League of Women Voters*. First, whereas the statute in *League of Women Voters* leveraged a 1% federal grant into a bar on editorializing by the *entire* broadcasting station, the Title X regulations apply only to the Title X-funded program operated by the recipient organization. They do not restrict any of the organization's other programs or operations. The recipient organization therefore is able to "limit[] the use of its federal funds to [Title X] activities." It is *not* "barred from using even wholly private funds to finance" its pro-abortion activities outside the Title X program. Accordingly, even if a portion of Title X funds might somehow be deemed "wholly private," such portion may be subjected to Title X restrictions. *League of Women Voters*, 468 U.S. at 400; *see also Regan*, 461 U.S. at 551-553 (Blackmun, J., concurring) (restriction preventing Section 501(c)(3) organization and its Section 501(c)(4) affiliate from spending on lobbying any portion of individual tax-deductible contributions to the Section 501(c)(3) organization is permissible since the Section 501(c)(4) affiliate can use other funds to lobby).

Second, the Title X matching funds and grant-related income that supplement the direct 90% federal grants are more properly characterized as "public moneys" rather than "wholly private funds," and restrictions on use of these Title X funds are permissible. Any other conclusion would permit a participant in any federal

matching program—who has agreed to dedicate certain limited funds to that program—to dilute or subvert the purposes of the program.

In *Regan*, the Court, upholding the requirement that a Section 501(c)(3) organization not engage in substantial lobbying in order to qualify to receive tax-deductible contributions, held that this requirement did not penalize the right of the organization to lobby. Rather, "Congress has merely refused to pay for the lobbying out of *public moneys*," 461 U.S. at 545 (emphasis added). The Court's ruling in *Regan* is instructive in that the Court treated the entirety of tax-deductible contributions received by the organization from *private* individuals as "*public* moneys" because those contributions had the impetus of a substantial federal subsidy. Thus, the Court first recognized that "[tax-d]eductible contributions are similar to cash grants of the amount of a *portion* of the individual's contribution." 416 U.S. at 544 (emphasis added). It then characterized as "public moneys" not only that *portion* of the individual's contribution that was similar to a cash grant (i.e., the amount by which the individual's tax burden was lessened), *but rather the entire contribution.*[24] *Id.* at 545.

As in *Regan*, and unlike in *League of Women Voters*,[25] the Title X matching funds and grant-related income are

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[24] In contrast to the Court's analysis in *Regan*, one might have argued that a $100 contribution by an individual in the 28% tax bracket comprised a $28 cash grant by the government and a $72 private contribution by the individual, and that Congress should not be able to prohibit a Section 501(c)(3) organization from using the $72 "private" contribution for lobbying. But the Court properly did not adopt such an analysis, which ignores, *inter alia*, the impetus that the substantial federal subsidy—in the form of tax-deductibility—provided for the seemingly private portion of the contribution.

[25] The CPB grants in *League of Women Voters* could amount to as little as 1% of a station's overall income, 468 U.S. at 399-400, and were not structured in a manner (e.g., tax-deductibility or matching program) that inherently provided impetus for private contributions.

not "wholly private funds" since they benefit from the impetus of the federal government's direct grant of at least 90% of the costs of Title X programs. Indeed, these moneys are far more clearly "public" than the "public moneys" in *Regan* for several reasons.

First, the Title X program is structured as a matching program. Thus, unlike the general-purpose tax subsidies at issue in *Regan*, the direct federal grant funds are specifically intended to provide an impetus for matching funds to promote the purposes of Title X. By agreeing to dedicate matching funds and grant-related income to a Title X program, a recipient organization effectively consents to a voluntary tax for these purposes.

Second, whereas the baseline percentage of the federal subsidy in *Regan* was the individual's marginal tax rate, the direct federal subsidy of Title X programs is at least 90%. Thus, federal funds provide the essential funding for Title X programs, and the high rate of subsidy provides even greater justification than in *Regan* for characterizing remaining Title X funds as public.

Third, whereas in *Regan* the Court understood the organization's contributions to come from private taxpayers, Title X recipient organizations can and do use other government funds (and, when permitted, grant-related income) to meet their matching share. *See* 45 C.F.R. §§ 74.52(a), 74.53(a)(2) (permitting matching share to be met through non-federal grants, which may include federal general revenue sharing funds); *id.* § 74.53(a)(3). Such matching funds would not be "wholly private" even apart from their dedication to Title X. Similarly, grant-related income—which is income generated by the Title X program and which presumptively serves to offset the gross costs of the program, 45 C.F.R. § 74.42(c)(1)—is more clearly public than the individual contributions in *Regan*.

In sum, the fact that the direct federal grants of 90% of the costs of Title X programs are supplemented by

matching grants and grant-related income does not render the Title X regulations constitutionally suspect.

B. Section 59.9, Either Alone Or In Tandem With Section 59.8, Does Not Impermissibly Burden Recipient Organizations' Rights To Engage In Abortion Activities Outside A Title X Program; Rather, It Ensures That Title X Funds Do Not Improperly Subsidize Such Abortion Activities.

Petitioners argue that the "program integrity" requirement of Section 59.9 unconstitutionally burdens the abortion-related expressive activities of recipient organizations outside the Title X program. Rust Brief at 27-31; State Brief at 42-46.

Petitioners' argument has two basic prongs. First, they argue that under Section 59.9, they will not be able to use Title X funds to share the costs of facilities and personnel used in common with non-Title X programs and activities. Rust Brief at 27-30; State Brief at 42-45. Second, they argue that Section 59.9, combined with Section 59.8, will prevent recipient organizations from using the Title X program to refer Title X clients to the abortion services that these same organizations provide outside the Title X program. Rust Brief at 30-31; State Brief at 45-46. *In short, Petitioners' real complaint is that they will not be able to use Title X funds to cross-subsidize their non-Title X activities and to solicit clients for their non-Title X abortion services.*

Contrary to Petitioners' claim (Rust Brief at 28 & n. 49; State Brief at 44), this Court's opinion in *Regan* supports the appropriateness—indeed, the necessity—of preventing Title X funds from being used to cross-subsidize activities outside the scope of Title X. In *Regan*, the Court, in recognizing that an entity might employ a Section 501(c)(3) organization for nonlobbying activities and a Section 501(c)(4) organization for lobbying, warned that such an entity "would, of course, have to ensure that the § 501(c)(3) organization did not subsi-

dize the § 501(c)(4) organization; *otherwise, public funds might be spent on an activity Congress chose not to subsidize.*" 461 U.S. at 544 (emphasis added).

Absent the "physical separation" requirement of Section 59.9, Title X funds would be used to cross-subsidize non-Title X abortion services, and recipient organizations, including Petitioners, could subvert Title X by using Title X funds to solicit clients for abortions. Indeed, it was precisely such abuses that the Title X regulations were designed to end. 53 Fed. Reg. at 2924-25. Thus, it is clear that Petitioners have no right to "pool" Title X funds with other funds.[26]

In sum, Section 59.9, alone or in tandem with Section 59.8, does not infringe Petitioners' First Amendment rights. Instead, it operates to ensure that Title X funds not be used to promote an activity—abortion—that Congress chose not to subsidize through Title X.[27]

CONCLUSION

The Title X regulations do not infringe Petitioners' First Amendment rights. The American Academy of Medical Ethics therefore requests that the Court affirm the ruling of the United States Court of Appeals for the Second Circuit.

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[26] Each of the cases cited by Petitioners in support of a right to pool funds (*see* Rust Brief at 28, 29-30; State Brief at 44-45) involved pooling of private funds, not pooling of federal funds with private funds.

[27] Because Section 59.9 promotes the congressional purpose of ensuring that Title X funds are not used to subsidize abortion (or other non-Title X activities), Petitioners' strained reliance on *Regan* (Rust Brief at 28 & n. 49, State Brief at 44) is mistaken. *See Regan*, 461 U.S. at 544 n. 6 (separation requirement that is related to congressional purpose of ensuring that cross-subsidization does not occur is not unduly burdensome).

Respectfully submitted,

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